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No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

RAYMOND EUGENE JOHNSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the exclusionary rule requires the suppression of evidence obtained following a warrantless entry into respondent's house in the course of arresting him on probable cause, where the entry occurred prior to this Court's decision in *Payton* v. *New York*, 445 U.S. 573 (1980), and the court of appeals' decision in *United States* v. *Prescott*, 581 F.2d 1343 (9th Cir. 1978).

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UNITED STATES OF AMERICA, PETITIONER

v.

RAYMOND EUGENE JOHNSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a–11a) is reported at 626 F.2d 753. The order amending that opinion (App. B, *infra*, 12a–13a) is not yet reported. The court of appeals' prior opinions (App. C, *infra*, 14a–22a; App. D, *infra*, 23a–30a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1980 (App. E, *infra*, 31a). A petition for rehearing was denied on December 29, 1980 (App. F,

infra, 32a). On February 20, 1981, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including March 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Central District of California, respondent was convicted of aiding and abetting the obstruction of correspondence, in violation of 18 U.S.C. 1703 and 2. Respondent's sentence was suspended in favor of five years' probation.[1]

1. Prior to trial, respondent moved to suppress certain statements that he had given to government agents on the day of his arrest. The district court denied the motion. The pertinent evidence is summarized in the opinion of the court of appeals (App. A, *infra*, 2a–4a). It showed that on March 30, 1977, Lena Kearney received in the mail a letter addressed to Elihu Peterson. The letter contained a United States Treasury check payable to Peterson in the amount of $4,681. Following discussions with her sister-in-law, Wynona Powell, Kearney decided to attempt to cash the check. Powell telephoned co-defendant Oscar Joseph Dodd to ask him for assistance in cashing the check. The next day respondent, Dodd

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[1] Respondent, together with co-defendant Oscar Joseph Dodd, was charged in a two-count indictment with aiding and abetting the obstruction of correspondence, and with receiving stolen government property, in violation of 18 U.S.C. 641. Respondent was convicted on the obstruction of correspondence count but was acquitted on the stolen property count. Dodd was convicted on both counts and appealed; the Ninth Circuit affirmed his conviction in a separate opinion.

and Eugene McCardell met at Kearney's house and discussed methods for cashing the check. After making a telephone call, respondent stated that he believed he had found someone who could help cash the check. The three men then took the check and departed.

Thereafter, in the course of investigating this matter, Special Agent Richard Hemenway of the United States Secret Service interrogated Kearney about the check. Kearney related that respondent, whom she identified from a photo spread, was one of three men who had participated in a discussion at her house on possible methods of cashing the check and that he had made a telephone call in an attempt to find someone to forge a signature on the check. Wynona Powell gave Agent Hemenway respondent's telephone number and explained that co-defendant Dodd had told her that he could be reached at that number. Agent Hemenway also learned that respondent had been named as one of Dodd's associates in Dodd's criminal history on file with the Los Angeles Police Department.

Hemenway and Special Agent William Pickering went to respondent's house on May 5, 1977. Although the agents had obtained a warrant for Dodd's arrest they had not obtained one for respondent. After watching the residence for a short time the agents observed respondent's car pull into respondent's driveway and the two occupants of the car enter respondent's residence. The agents then approached the door, drew their weapons, pointed them downward, and knocked, identifying themselves by fictitious names. When respondent opened the door, the agents introduced themselves as Secret Serv-

ice agents and asked to talk with him. Respondent told the agents to come inside.

Pickering stood with respondent in the living room, while Hemenway conducted a cursory check of the premises for persons who might present a danger to the agents. Hemenway discovered a woman during his search and asked her to go into the living room. Upon completing the search, which took between 15 and 30 seconds, the agents returned their weapons to their holsters.

At Hemenway's request respondent agreed to step into the bedroom to talk with him. Hemenway informed respondent of his constitutional rights and respondent agreed to cooperate. During the course of the discussion, respondent told Hemenway about his involvement with the Treasury check. The agents then informed respondent that he was under arrest. The agents and respondent left the residence and went to the police station, where respondent, after again being advised of his constitutional rights, signed a written statement detailing his involvement in the check cashing scheme.

2. On respondent's appeal, the court of appeals initially affirmed his conviction. In its first opinion, filed on December 19, 1978 (App. D, *infra*, 23a–30a), the court concluded that, even though the agents testified that they had not intended to effect an arrest when they initially entered respondent's residence, "[respondent's] arrest occurred immediately upon the entry of the agents into [respondent's] home" (*id.* at 26a).[2] The court

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[2]The court reasoned that, regardless of the agents' subjective intentions, the determination whether an arrest has occurred de-

nonetheless concluded that the motion to suppress respondent's statements was properly denied because the agents had sufficient probable cause to arrest respondent prior to their entry. While noting that "[i]t certainly would have been preferable had the agents obtained a warrant" for respondent's arrest before entering his residence, the court held that "if probable cause exists for the arrest, [respondent's] constitutional rights were not violated by the warrantless arrest, even though there may have been time to have obtained a warrant for his arrest" (*id.* at 26a–27a).

On August 20, 1979, the court of appeals issued an amended opinion (App. C, *infra*, 14a–22a), to address the applicability to this case of its decision in *United States* v. *Prescott*, 581 F.2d 1343 (9th Cir. 1978), which had held that a warrantless entry into a third party's residence to arrest a suspect on probable cause violated the Fourth Amendment.[3] The court concluded that respondent's arrest occurred, not after the agents' entry into his house, as it previously had found, but prior to the entry when respondent opened the door "and was first confronted by the agents with their guns drawn"

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pends upon an objective "evaluation of what a person innocent of a crime would have thought of the situation, given all of the factors involved" (App. D, *infra*, 25a–26a). In light of the facts that the agents were armed when they entered respondent's house and that their weapons remained drawn while one of the agents remained with respondent and the other searched the house, the court concluded that "a reasonable person, under those circumstances, would have thought that he was under arrest" (*id.* at 26a).

[3] Although *Prescott* had been decided on September 14, 1978, prior to the court's first opinion in this case, that opinion made no mention of *Prescott*.

(App. C, *infra*, 17a; see *id.* at 18a). Accordingly, the court held that respondent's subsequent statements were admissible because the arrest was valid under *United States* v. *Santana*, 427 U.S. 38 (1976) (App. C, *infra*, 18a). The court distinguished *Prescott* on the ground that that case involved a forcible entry to effect an arrest, whereas here respondent was arrested in the doorway and the agents' subsequent entry was at respondent's invitation (App. C, *infra*, 18a–19a).

Following this Court's decision in *Payton* v. *New York*, 445 U.S. 573 (1980), the court of appeals issued another opinion, this time reversing respondent's conviction (App. A, *infra*, 1a–11a). The court noted that unlike the situation in *Riddick* v. *New York*, the companion case to *Payton*, the agents in this case did not enter respondent's residence prior to effecting his arrest (App. A, *infra*, 7a). Nonetheless, relying on the "strong language" in *Payton* "emphasizing the special protection the Constitution affords to individuals within their homes" (App. A, *infra*, 7a), the court concluded that "it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home. Otherwise, arresting officers could avoid illegal 'entry' into a home simply by remaining outside the doorway and controlling the movements of suspects within through the use of weapons that greatly extend the 'reach' of the arresting officers" (*ibid.*). Accordingly, the court held that the warrantless arrest violated respondent's Fourth Amendment rights (*ibid.*).[4] Having

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[4]The court purported to distinguish the doorway arrest in this case from that in *United States* v. *Santana*, *supra*, on the ground that respondent did not voluntarily expose himself to

determined that the arrest was unlawful, the court went on to hold that respondent's confession should have been suppressed as a fruit of that arrest (*id.* at 8a–11a).

In response to the government's argument, in its petition for rehearing, that the principles of *Payton* should not be applied retroactively, the court of appeals revised its amended opinion to include a footnote explaining that its decision rested on the principles announced in *United States* v. *Prescott*, *supra*, and *Payton* v. *New York*, *supra* (App. B, *infra*, 12a–13a). Although respondent's arrest occurred prior to either of those decisions, the court pointed out that in *United States* v. *Blake*, 632 F.2d 731 (9th Cir. 1980), it had held that the rule of *Prescott* applied retroactively in the Ninth Circuit to arrest entries that occurred prior to *Prescott* (App. B, *infra*, 13a).

REASONS FOR GRANTING THE PETITION

This case presents the important question whether the principles announced in *Payton* v. *New York*, *supra*, are to be applied retroactively to exclude evidence obtained in the course of warrantless arrest entries that occurred before *Payton* was decided. The issue of the retroactivity of *Payton* is presently before the Court in *Steagald* v. *United States*, No. 79–6777 (argued Jan. 14, 1981).[5] For the reasons stated in our brief in *Steagald*, we believe that the court of appeals erred in applying

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public view but rather was induced to open his door when the agents misrepresented their identities (App. A, *infra*, 6a–7a).

[5] We are sending respondent's counsel a copy of our brief in *Steagald*.

the principles of *Payton* to suppress respondent's statements as the fruits of an unlawful arrest.[6]

At the time of respondent's arrest in May 1977, neither this Court nor the Ninth Circuit had held that the Fourth Amendment imposed a warrant requirement on officers making arrests inside private premises. The opinion in *Payton* marked a sharp break in this Court's decisions regarding arrest entries. Under settled principles, *Payton* should not be given retroactive effect. See *United States* v. *Peltier*, 422 U.S. 531 (1975); *Stovall* v.

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[6]We do not agree with the court of appeals' conclusion that if *Payton* is to be given retroactive effect, respondent's statements must be suppressed. The Court in *Payton* did not hold that a home is a sanctuary where a suspect is immune from warrantless arrest. Rather, *Payton* established that, absent exigent circumstances, law enforcement officers violate the Fourth Amendment when they invade the privacy of the home without prior judicial approval in order to make an arrest. If an arrest can be effected without an unconsented entry, the homeowner's Fourth Amendment rights have not been infringed, in the same way that the owner's rights are not violated when the police, without making any physical entry into the home, seize a package of contraband tossed out the window in response to their knock on the door. See *United States* v. *Arboleda*, 633 F.2d 985, 991-992 (2d Cir. 1980), cert. denied, No. 80-954 (Feb. 23, 1981). Because the agents had probable cause to arrest respondent, the arrest itself, even without a warrant, was proper. *United States* v. *Watson*, 423 U.S. 411 (1976). Moreover, even if respondent cannot be said to have voluntarily consented to the subsequent entry into his house, his statements were a product not of the arguably unlawful entry but of the lawful arrest. While we believe that the court of appeals' rulings on both the substantive Fourth Amendment issue and the fruits issue are incorrect, we have not raised those issues as separate questions warranting review because in the particular factual setting of this case it is unclear whether respondent's arrest took place at the doorway or subsequent to the agents' entry, and it is also uncertain whether or not respondent validly consented to the entry.

Denno, 388 U.S. 293, 297 (1967). No possible deterrent purpose would be served by excluding the fruits of warrantless arrest entries that law enforcement officers did not know, and could not reasonably be charged with knowing, were proscribed by the Fourth Amendment. Furthermore, the extent of reliance on the pre-*Payton* rule allowing warrantless arrest entries—a practice referred to in *Payton* as "longstanding" and "widespread" (445 U.S. at 600)—and the burden on the administration of justice that would flow from retroactive application both suggest that *Payton* should apply prospectively only.

For similar reasons, the court below erred in concluding, in reliance on *United States* v. *Blake*, *supra*, that the Ninth Circuit's decision in *Prescott* should be given retroactive effect. In *Blake*, the court held that the result in *Prescott* had been "'clearly foreshadowed'" (632 F.2d at 735). The court noted that in two pre-*Prescott* cases (*United States* v. *Calhoun*, 542 F.2d 1094, 1102 (1976), cert. denied, 429 U.S. 1064 (1977); *United States* v. *Phillips*, 497 F.2d 1131, 1135 (1974)) it had suggested that a warrant might well be required to justify an entry into private premises to effect an arrest.[7] Although it ac-

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[7] In *Calhoun*, the government conceded that, absent exigent circumstances, an arrest warrant was required before law enforcement officers could enter defendant Sheppard's apartment in order to effect his arrest (542 F.2d at 1102). Since no exigent circumstances were present, the court held that evidence seized as a result of the entry should have been suppressed (*id.* at 1102–1103). In *Phillips*, the court concluded that the entry was unlawful because the agents lacked probable cause to believe that the defendant was inside the premises at the time of the entry (497 F.2d at 1136).

knowledged that neither *Calhoun* nor *Phillips* actually held that a warrant was required and that prior to *Prescott* it had "avoided the issue repeatedly either by finding that probable cause to arrest was lacking or, when not lacking, that exigent circumstances existed," the court concluded that its persistent avoidance of the issue should have signalled to law enforcement officers that the issue might be decided adversely to the government and that this was sufficient to constitute a clear foreshadowing of the decision in *Prescott*. 632 F.2d at 735-736.

The Ninth Circuit's decision in *Blake* that *Prescott* should be applied retroactively and the court's retroactive application of *Prescott* to suppress evidence in this case are plainly wrong. In its initial opinion, issued three months after *Prescott* was decided, the court below upheld the warrantless entry into respondent's house (App. D, *infra*). If the panel of judges in this very case was not aware even after *Prescott* that a warrant was required to uphold arrest entries that occurred prior to *Prescott*, it is difficult, if not impossible, to conclude that law enforcement officers in May 1977 should have known of the impending change in the law. Thus, the same analysis that applies to the retroactivity of this Court's decision in *Payton* also applies to the retroactivity of the Ninth Circuit's decision in *Prescott*. Under that analysis, neither *Payton* nor *Prescott* should be given retroactive effect, and the court of appeals therefore erred in applying to this case the principles it distilled from those decisions.

We recognize that the question whether a previous decision establishing a new Fourth Amendment principle

governing law enforcement conduct may, in some sense, be characterized as one of diminishing importance, since law enforcement officers can be expected to adhere to the new standards, and there is little danger that defendants with Fourth Amendment claims whose convictions have already been upheld on direct appeal will succeed in overturning their convictions on collateral attack. See *Stone* v. *Powell*, 428 U.S. 465 (1976). In addition, we realize that the question whether a court of appeals' decision should be given retroactive effect is ordinarily not of sufficient importance to warrant this Court's review. But the decision of the court of appeals in this case holding *Payton* and *Prescott* retroactive is methodologically unsound and is inconsistent with a proper understanding of the policies underlying the Fourth Amendment's exclusionary rule. The errors underlying *Blake* and the instant case will infect subsequent decisions on the retroactivity of other new Fourth Amendment rulings. It is important for this Court to ensure that the courts of appeals employ a sound analytical approach in deciding basic Fourth Amendment questions, including the retroactivity question presented here.

Because the issue of the retroactivity of *Payton* is presently under submission in *Steagald*, we submit that the Court should defer consideration of this petition pending its decision in *Steagald*. If the Court determines in *Steagald* that *Payton* is not to be applied retroactively, the Court should grant this petition, vacate the judgment of the court of appeals and remand this case to that court for further consideration in light of *Steagald*. If the Court does not decide the retroactivity issue in

Steagald, the Court should grant this petition in order to resolve the issue.

CONCLUSION

The Court should defer disposition of this petition for a writ of certiorari pending its decision in *Steagald* v. *United States* and should then dispose of the petition as appropriate in light of that decision.

Respectfully submitted.

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MARCH 1981

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

UNITED STATES OF AMERICA
APPELLEE,

v.

RAYMOND EUGENE JOHNSON,
APPELLANT

No. 77-3808

Argued and Submitted October 10, 1978.
Decided September 2, 1980.

Appeal from the United States District Court
For the Central District of California.

ORDER

Before ANDERSON and HUG, *Circuit Judges*, and EAST*, *District Judge.*

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*Honorable William G. East, United States District Judge for the District of Oregon, sitting by designation.

HUG, *Circuit Judge:*

Appellant, Raymond Eugene Johnson, was convicted in a jury trial of aiding and abetting the obstruction of correspondence, a violation of 18 U.S.C. § 1703 and 18 U.S.C. § 2. Johnson appeals on the ground that statements made by him on the day of his arrest should have been suppressed for the reason that the arrest was illegal and the statements were products of the illegal arrest and not voluntarily made, and on the further ground that the judge committed error in instructing the jury concerning the voluntariness of appellant's confession. We reverse.

FACTS

On March 30, 1977, Lena Kearney received by mistake in the mail a letter addressed to Elihu Peterson, containing a United States Treasury check payable to Peterson, in the amount of $4,681.00. Kearney discussed the receipt of this check with her sister-in-law, Wynona Powell, and decided to keep the check and attempt to cash it. Powell then phoned a friend, Joe Dodd, to ask him for assistance in cashing the check. On the following day, Dodd arrived at the Kearney residence with Eugene McCardell and Raymond Johnson, the appellant. The three men seated themselves around a coffee table in Kearney's living room and studied the check. Johnson picked up the check and made a telephone call. During this call he discussed the check and the difficulty of cashing the check because of the age of the payee. Johnson then returned after completing the call and stated that he believed he had someone who could assist them in cashing the check. Dodd, Johnson and McCardell then left the Kearney residence and took the check with them.

Special Agent Richard Hemenway of the United States Secret Service commenced investigating this matter. He interrogated Lena Kearney, who told them that appellant Johnson was one of three men who came to her house for the check and participated in a general discussion as to how to cash the check. She further stated that Johnson made a telephone call in an attempt to find someone to forge the check. Kearney also identified Johnson from a photo spread as the

person who had come to her house. Wynona Powell gave Agent Hemenway appellant Johnson's telephone number, which she stated had been given to her by Dodd as the number at which Dodd could be contacted. Upon checking with the Los Angeles Police Department, Agent Hemenway discovered that Johnson was named in the criminal history files as an associate of Dodd in Dodd's criminal history. Special Agent Hemenway did obtain a warrant for the arrest of Dodd, based on the above and other information obtained through investigation. A warrant for the arrest of Johnson was not obtained.

Special Agent Hemenway and Special Agent William Pickering went to the Johnson house on May 5, 1977, at approximately 6:00 P.M. The agents watched the house for a short period and Agent Pickering saw Johnson's vehicle, with two persons inside, pull up to the driveway of Johnson's house. The two agents then approached the doorway, drew their weapons, pointed them downward and knocked, at first identifying themselves by fictitious names. When Johnson opened the door, Hemenway introduced himself and Pickering as special agents and asked to talk with Johnson. Johnson told the agents to come in. Pickering then stood in the living room with Johnson, while Hemenway looked into the other rooms for other people who might be in the house and present a possible danger to the agents. A woman was discovered during the search and was asked to go into the living room. After Hemenway finished looking into the rooms, which took between 15–30 seconds, he told Pickering that everything was secure. Pickering and Hemenway then returned their weapons to their holsters.

Hemenway then asked Johnson if he would step into the bedroom to talk with him, and Johnson agreed. Before entering the bedroom, Hemenway informed Johnson of his constitutional rights. Johnson responded that he wished to cooperate and then told Hemenway of his involvement in taking the Treasury check. Johnson was then told that he was under arrest. The agents and Johnson left the residence and went to the police station. At the station, Johnson was again advised of his constitutional rights and stated that he

understood them. He told Pickering of his involvement with the check while Pickering wrote out the statement. Johnson read the statement, made changes and initialed them. He was placed under oath by Pickering and signed the statement.

Legality of the Arrest

The two special agents testified that they had not intended to effect an arrest at the time they initially entered the residence of appellant Johnson. It was their belief that an arrest had not occurred until after the interview with Johnson. However, whether an arrest had occurred depends upon an objective, not subjective, evaluation of what a person innocent of a crime would have thought of the situation, given all of the factors involved. When an arrest has occurred depends in each case upon an evaluation of all the surrounding circumstances. Primary among these is a determination of whether or not the defendant was free to choose between terminating or continuing the encounter with the law enforcement officers. *See Sibron v. New York*, 392 U.S. 40, 67, 88 S.Ct. 1889, 1904, 20 L.Ed.2d 917 (1968); *United States v. Sanudo-Perez*, 564 F.2d 1288, 1290 (9th Cir. 1978); *accord*, *United States v. Beck*, 598 F.2d 497 (9th Cir. 1979).

From a review of all of the circumstances surrounding the encounter between Johnson and the special agents, we find that appellant's arrest occurred as he stood within his home at the doorway of his home and was first confronted by the agents with their guns drawn. The agents then entered the home with their guns still drawn until the search of the home had been concluded. Johnson was held in the living room while the house was searched. One of the agents remained with Johnson at all times. It is extremely doubtful that Johnson would have believed that he was free to leave at any time or to request the officers to leave after the initial encounter. A reasonable person, under those circumstances, would have thought that he was under arrest.

We must determine whether, even assuming that probable cause existed, the arrest of Johnson in his doorway without first obtaining a warrant violated his Fourth Amend-

ment rights. A warrantless arrest of an individual in a public place upon probable cause does not violate the Fourth Amendment, even though exigent circumstances may not exist. *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976).

In *United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976), the Supreme Court upheld the warrantless arrest of a defendant who was standing within the frame of her doorway as the officers approached and who then retreated into the vestibule of her home where the officers followed and effected the arrest. The Court held that once the defendant was exposed to public view in her doorway, her act of retreating into her house could not thwart an otherwise proper arrest by officers who pursued her inside. The Ninth Circuit has applied the holding of *Santana* and has upheld the legality of a warrantless arrest of a defendant as he stood in the doorway of his home, *United States v. Botero*, 589 F.2d 430 (9th Cir. 1978), *cert. denied*, 441 U.S. 944, 99 S.Ct. 2162, 60 L.Ed.2d 1045 (1979). In that case, Botero, under surveillance by federal officers, was followed to his home. Officers knocked on the front door, which was opened by Botero, and Botero was placed under arrest while he stood in the doorway.

Most recently, in *Payton v. New York*, ___ U.S. ___, 100 S.Ct. 1371, 1375, 63 L.Ed.2d 639 (1980), the Supreme Court held that the Fourth Amendment "prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest." The appeal involved a consolidation of two cases on appeal from the New York Court of Appeals and challenged the constitutionality of a New York statute authorizing police officers to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest. In each case the police officers, acting with probable cause but without a warrant, had entered the appellant's premises to make an arrest. In the case of appellant Theodore Payton, the officers broke into the appellant's apartment when there was no response to their knock on the door. No one was there, but they seized evidence which was in plain view and which was

later admitted in evidence at his trial for murder. In the case of Obie Riddick, the officers knocked on the door of the house where Riddick was living. His three-year-old son opened the door, allowing the officers to see Riddick sitting in bed. They entered the house and placed him under arrest.

The Court held the arrests in both cases to be illegal because of the warrantless nonconsensual entry into the homes of the appellants. The Court emphasized the significance of the boundaries of the dwelling:

> But the critical point is that any differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind. The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home. The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable Government intrusion." *Silverman v. United States*, 365 U.S. 505, 511 [81 S.Ct. 679, 682, 5 L.Ed.2d 734]. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

___ U.S. at _____, 100 S.Ct. at 1381–82.

This case can be distinguished from both *Santana* and *Botero*. In *Santana* the suspect was in full view in the doorway as the officers approached. In *Botero* there was no subterfuge in getting the suspect to open the door; furthermore, exigent circumstances existed. In contrast, Johnson opened the door of his dwelling after the agents misrepresented their identities; thus, Johnson's initial exposure to the view and the physical control of the agents was not consensual on

his part. *Cf. Payton*, ___ U.S. at ___, 100 S.Ct. at 1378 (entries were similarly nonconsensual). Moreover, Johnson's invitation to the agents to enter after the door was opened was hardly voluntary in light of the coercive effect of the weapons brandished by the agents.

This case, on the other hand, differs from both of the situations addressed in *Payton*. The illegal search of Payton's home and the illegal arrest of Riddick did not occur until the police had entered the suspect's homes. ___ U.S. at ___ ___, 100 S.Ct. at 1374–76. In this case, we are confronted with the situation where the suspect was arrested as he stood inside his home and the officers stood outside his home with drawn weapons. In these circumstances, it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home. Otherwise, arresting officers could avoid illegal "entry" into a home simply by remaining outside the doorway and controlling the movements of suspects within through the use of weapons that greatly extend the "reach" of the arresting officers.

The *Payton* decision held that in the case of Obie Riddick the warrantless entry of the Riddick's home by police officers to arrest Riddick was not justified when his three-year-old son opened the door and they could see him sitting in bed. We doubt the Supreme Court would have reached a different result had the police stood at the doorway and immediately placed Riddick under arrest with weapons drawn.

The case rather closely parallels that of the *Riddick* case discussed in *Payton*. Riddick did not voluntarily expose himself to warrantless arrest by the police as in a public place by allowing his three-year-old son to open the door of his home. Similarly, it cannot be said that Johnson voluntarily exposed himself to warrantless arrest by opening his door to agents who misrepresented their identities. In light of the strong language by the Court in *Payton* emphasizing the special protection the Constitution affords to individuals within their homes, we find that the warrantless arrest of Johnson, while he stood within his home, after having opened the door in response to false identification by the agents, constituted a violation of his Fourth Amendment rights.

Fruits of the Arrest

The final question is whether the statements made by Johnson after his arrest were fruits of the unlawful arrest. The first statement was given by Johnson in his bedroom after he had been given his *Miranda* warnings but before he was formally told he was under arrest. In that statement, he admitted his involvement in taking the Treasury check. After having been placed formally under arrest he was taken to the police station where he was again given a *Miranda* warning before he signed a similar written statement under oath.

In *Brown v. Illinois*, 422 U.S. 590, 603, 95 S.Ct. 2254, 2261, 45 L.Ed.2d 416 (1975) the Supreme Court held that "*Miranda* warnings, *alone* and *per se*, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession."

Therefore, a determination that statements made after *Miranda* warnings were "voluntary" for purposes of the Fifth Amendment merely meets the "threshold requirement" for Fourth Amendment analysis. *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 2259, 60 L.Ed.2d 824 (1980); *United States v. Perez-Esparza*, 609 F.2d 1284, 1288 (9th Cir. 1980).

The Court in *Dunaway* elaborated on the *Brown* doctrine stating:

> *Brown* articulated a test designed to vindicate the "distinct policies and interests of the Fourth Amendment." Following *Wong Sun* [*v. U.S.*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441], the court eschewed any *per se* or "but for" rule, and identified the relevant inquiry as "whether Brown's statements were obtained by exploitation of the illegality of his arrest." *Brown's* focus on "the causal connection between the illegality and the confession," reflected the two policies behind the use of the exclusionary rule to effectuate the Fourth Amendment. When there is a close causal connection between the illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police

> misconduct in the future, but use of the evidence is more likely to compromise the integrity of the courts.

Dunaway, 99 S.Ct. at 2259 (citations omitted).

The three factors identified in *Brown* in determining whether the statements were obtained by exploitation of an illegal arrest were:

(1) the temporal proximity of the statements and the arrest;

(2) the presence of any intervening circumstances; and,

(3) the purpose and flagrancy of the official misconduct.

Brown, 442 U.S. at 603–04, 95 S.Ct. at 2261–62. The focus of these factors as emphasized in *Dunaway* is the "causal connection" between the illegal detention. The first two factors, "temporal proximity" and "the presence of intervening circumstances," clearly pertain to the determination of whether the defendant supplied the evidence of his own free will, apart from any compulsion caused by the illegal detention. The attenuation which we analyze is the degree of causal remoteness between the illegal detention and the evidence obtained from the defendant.

The third factor, "the purpose and flagrancy of the official misconduct," could arguably be viewed as a broad general factor utilized to assess whether the flagrancy of police misconduct justifies the exclusion of the evidence in light of the deterrence rationale of the exclusionary rule. *See Dunaway*, 99 S.Ct. at 2263 (dissenting opinion of Rehnquist, J.), *Perez-Esparza*, 609 F.2d at 1289–91.

However, the Court appears instead to apply the third factor along with the first two factors in determining the degree of causal remoteness. Justice Stevens in his concurring opinion in *Dunaway* stresses this point, stating:

> The flagrancy of the official misconduct is relevant, in my judgment, only insofar as it has a tendency to motivate the defendant. . . . [I]f the Fourth Amendment is violated, the admissibility question will turn on the causal relationship between the violation and the defendant's subsequent confession.

Dunaway, 99 S.Ct. at 2260 (citations also omitted). The majority opinion in *Dunaway* repeatedly emphasizes that it is

the "causal connection" that is the relevant inquiry in making the attenuation determination. The majority opinion affords only brief consideration to the "purpose and flagrancy" factor in that case. A reasonable explanation is that the close causal connection between the illegal detention and the evidence obtained from defendant Dunaway was apparent from consideration of the temporal proximity and the lack of intervening circumstances, even though the conduct of the police was not especially flagrant.

The statement of Johnson given to Agent Hemenway in his bedroom, in which he admitted his involvement in taking the Treasury check, was made within ten minutes after the entry and, as in *Dunaway*, "[n]o intervening events broke the connection between petitioner's illegal detention and the confession." *Dunaway*, 99 S.Ct. at 2260. The later statement at the police station was substantially in accord with his earlier statement. This later statement was clearly the result and fruit of the first. *See Brown*, 422 U.S. at 605, 95 S.Ct. at 2262. Having given one statement which inculpated him in the crime, he had already committed himself; there was little incentive to withhold a repetition of it. He had been advised that the first statement could be used against him, and thus, the second statement confirming the first has a close causal connection to the first. The second statement was given within an hour or two of the first and there were no intervening circumstances of significance other than being given an additional *Miranda* warning at the station.[1] The first two *Brown* factors clearly indicate that the causal relationship between the illegal arrest and the incriminating statements was so close as to require the conclusion that

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[1]The Government argues that Johnson was permitted to drive his own automobile to the police station. Thus, Johnson did have a brief time away from the agents, but he went directly to the station, he did not consult an attorney or anyone else, and he was keenly aware that he had just admitted his involvement in the crime. He was not free to leave, but was required to go directly to the police station. Thus, he was not free from police influence for any significant period as in *Wong Sun*.

Johnson's statements were "obtained by exploitation of the illegality of his arrest," *Dunaway*, 99 S.Ct. at 2259.

The third factor, "the purpose and flagrancy of the police misconduct" could be particularly important in some cases in influencing the suspect to make statements after an illegal arrest. However, in this instance, as in *Dunaway*, it was not. The close causal relationship between the illegal arrest and the statements established by the first two factors require the conclusion that Johnson's statements were "obtained by exploitation of the illegality of his arrest," *Dunaway*, 99 S.Ct. at 2259. Therefore, the statements should have been suppressed, and we reverse on that ground; we need not consider the remaining grounds for appeal.

REVERSED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

RAYMOND EUGENE JOHNSON,
DEFENDANT-APPELLANT.

Filed December 29, 1980

No. 77-3808

ORDER

Before: ANDERSON and HUG, *Circuit Judges*, and EAST*, *District Judge*

The panel has voted unanimously to revise the Amended Opinion as follows:

Page 5, lines 25–29 with the word "a" on line 30 are deleted and replaced with:

> A few months prior to our decision in *Botero* we held that "absent exigent circumstances, police who have probable cause to arrest a felony suspect must obtain a warrant before entering a dwelling to carry out the arrest." *United States v. Prescott*, 581 F.2d 1343, 1350 (9th Cir. 1978). The Supreme Court recently came to a similar conclusion in *Payton v. New York*, 100 S.Ct. 1371 (1980). In *Payton*, the Court held that the Fourth Amendment "prohibits the police from making a warrantless and non consensual entry into a suspect's home in order to make a routine felony arrest." Id. at 1375. The appeal in *Payton* involved a

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*The Honorable William G. East, United States District Judge for the District of Oregon, sitting by designation.

Place the signal for footnote 1 after the word "rights" on page 8, line 17. Footnote 1 appearing on line 18, page 11 is changed to footnote 2. The text of footnote 1 will read:

> Our decision today rests chiefly upon basic principles common to our decision in *Prescott* and that of the Supreme Court in *Payton*. We have held the rule announced in *Prescott* to apply retroactively in this circuit to suspects arrested prior to the *Prescott* decision. *United States v. Blake*, No. 79–1078, slip op. 4586 (9th Cir. Aug. 7, 1980). Consequently, though Johnson was arrested prior to our decision in *Prescott*, we apply to this case the warrant requirement confirmed in *Prescott* and *Payton*.

APPENDIX C

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

AMENDED OPINION

No. 77-3808.

UNITED STATES OF AMERICA,
APPELLEE,

v.

RAYMOND EUGENE JOHNSON,
APPELLANT

Dec. 19, 1978.

Rehearing and Rehearing En banc
Denied August 20, 1979

Appeal from the United States District Court for the Central District of California.

Before ANDERSON and HUG, *Circuit Judges*, and EAST*, *District Judge*.

HUG, *Circuit Judge:*

Appellant, Raymond Eugene Johnson, was convicted in a jury trial of aiding and abetting the obstruction of correspondence, a violation of 18 U.S.C. § 1703 and 18 U.S.C. § 2. Johnson appeals on the ground that statements made by him on the day of his arrest should have been suppressed for the reason that the arrest was illegal and the statements were products of the illegal arrest and not vol-

*The Honorable William G. East, United States District Judge for the District of Oregon, sitting by designation.

untarily made, and on the further ground that the judge committed error in instructing the jury concerning the voluntariness of appellant's confession. We affirm.

FACTS

On March 30, 1977, Lena Kearney received by mistake in the mail a letter addressed to Elihu Peterson, containing a United States Treasury check payable to Peterson, in the amount of $4,681.00. Kearney discussed the receipt of this check with her sister-in-law, Wynona Powell, and decided to keep the check and attempt to cash it. Powell then phoned a friend, Joe Dodd, to ask him for assistance in cashing the check. On the following day, Dodd arrived at the Kearney residence with Eugene McCardell and Raymond Johnson, the appellant. The three men seated themselves around a coffee table in Kearney's living room and studied the check. Johnson picked up the check and made a telephone call. During this call he discussed the check and the difficulty of cashing the check because of the age of the payee. Johnson then returned after completing the call and stated that he believed he had someone who could assist them in cashing the check. Dodd, Johnson and McCardell then left the Kearney residence and took the check with them.

Special Agent Richard Hemenway of the United States Secret Service commenced investigating this matter. He interrogated Lena Kearney, who told him that appellant Johnson was one of three men who came to her house for the check and participated in a general discussion of how to cash the check. She further stated that Johnson made a telephone call in an attempt to find someone to forge the check. Kearney also identified Johnson from a photo spread as the person who had come to her house. Wynona Powell gave Agent Hemenway appellant Johnson's telephone number, which she stated had been given to her by Dodd as the number at which Dodd could be contacted. Upon checking with the Los Angeles Police Department, Agent Hemenway discovered that Johnson was named in the crim-

inal history files as an associate of Dodd in Dodd's criminal history. Special agent Hemenway did obtain a warrant for the arrest of Dodd, based on the above and other information obtained through investigation. A warrant for the arrest of Johnson was not obtained.

Special Agent Hemenway and Special Agent William Pickering went to the Johnson house on May 5, 1977, at approximately 6:00 P.M. The agents watched the house for a short period and Agent Pickering saw Johnson's vehicle, with two persons inside, pull up to the driveway of Johnson's house. The two agents then approached the doorway, drew their weapons, pointed them downward and knocked, at first identifying themselves by fictitious names. When Johnson opened the door, Hemenway introduced himself and Pickering as special agents and asked to talk with Johnson. Johnson told the agents to come in. Pickering then stood in the living room with Johnson, while Hemenway looked into the other rooms for other people who might be in the house and present a possible danger to the agents. A woman was discovered during the search and was asked to go into the living room. After Hemenway finished looking into the rooms, which took between 15–20 seconds, he told Pickering that everything was secure. Pickering and Hemenway then returned their weapons to their holsters.

Hemenway then asked Johnson if he would step into the bedroom to talk with him and Johnson agreed. Before entering the bedroom, Hemenway informed Johnson of his constitutional rights. Johnson responded and stated that he wished to cooperate and then told Hemenway of his involvement in taking the Treasury check. Johnson was then told the he was under arrest. The agents and Johnson left the residence and went to the police station. At the station, Johnson was again advised of his constitutional rights and stated that he understood them. He told Pickering of his involvement with the check, while Pickering wrote out the statement. Johnson read the statement, made changes and initialed them. He was placed under oath by Pickering and signed the statement.

LEGALITY OF THE ARREST AND VOLUNTARINESS OF THE CONFESSION

It was the testimony of the two special agents that they had not intended to effect an arrest at the time they initially entered the residence of appellant Johnson. It was their belief that an arrest had not occurred until after the interview with Johnson. However, whether an arrest has occurred depends upon an objective, not subjective, evaluation of what a person innocent of a crime would have thought of the situation, given all of the factors involved. When an arrest has occurred depends in each case upon an evaluation of the surrounding circumstances. Primary among these is a determination of whether or not the defendant was free to choose between terminating or continuing the encounter with the law enforcement officers. *Sibron v. New York*, 392 U.S. 40, 67, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968); *United States v. Sanudo-Perez*, 564 F.2d 1288, 1290 (9th Cir. 1977); *accord*, *United States v. Beck*, 598 F.2d 497 (9th Cir. 1979).

From a review of all of the circumstances surrounding the encounter between Johnson and the special agents, we find that appellant's arrest occurred as he stood in the doorway of his home and was first confronted by the agents with their guns drawn. The agents then entered the home with their guns still drawn until the search of the home had been concluded. Johnson was held in the living room while the house was searched. One of the agents remained with Johnson at all times. It is exremely doubtful that Johnson would have believed that he was free to leave at any time or to request the officers to leave after the initial encounter. A reasonable person, under those circumstances, would have thought that he was under arrest.

We must first determine whether, even assuming that probable cause existed, the arrest of Johnson in his doorway without first obtaining a warrant violated his Fourth Amendment rights. A warrantless arrest of an individual in a public place upon probable cause does not violate the Fourth Amendment, even though exigent circumstances

may not exist. *United States* v. *Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976).

In *United States* v. *Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976), the Supreme Court upheld the warrantless arrest of a defendant who was standing in her doorway as the officers approached and then retreated into the vestibule of her home where the officers followed and effected the arrest. The Court held that once the defendant was exposed to public view in her doorway, her act of retreating into her house could not thwart an otherwise proper arrest by officers who pursued her inside. The Ninth Circuit, in a case similar to the present one, has applied the holding of *Santana* and has upheld the legality of an arrest of a defendant as he stood in the doorway of his home. In *United States* v. *Botero*, 589 F.2d 430 (9th Cir. 1978), Botero, under surveillance by federal officers, was followed to his home. Officers knocked on the front door, which was opened by Botero, who was placed under arrest while he stood in the doorway. We held that the arrest did not violated the Fourth Amendment rights of Botero. We stated that under *Santana* the officers would have been justified in following Botero into his apartment to arrest him.

Johnson, when arrested, was standing in the doorway of his home, exposed to public view, having opened his front door voluntarily. Although the agents did not formally arrest Johnson, the totality of the circumstances indicate that Johnson was under arrest at that point. Under *Botero*, the subsequent entry of the agents into Johnson's home at his invitation cannot be held to invalidate the arrest under the Fourth Amendment.

The present case is distinguishable from this court's prior decision in *United State* v. *Prescott*, 581 F.2d 1343 (9th Cir. 1978). In *Prescott*, Government agents knocked on the door of a third person's apartment and were refused entry. The officers eventually kicked in the door to obtain entry, searched out the defendant who was hiding inside and arrested him. The court held that, absent exigent circumstances, the forced entry to effect the arrest was unconstitutional.

The defendant in this case responded to the agent's knock by opening the door to his home. Agents did not enter the home to arrest Johnson; his arrest took place at the doorway. The subsequent entry into the home was at Johnson's invitation. Although Johnson was under arrest at that time, and the invitation can hardly be considered voluntary, it differs markedly from a forced entry into a home to effect an arrest therein.

We next consider whether probable cause existed prior to the time of the arrest. The special agents had received information from Lena Kearney and Wynona Powell that Johnson had been present with Dodd and McCardell at the Kearney residence when the check was viewed and cashing of it through a forged signature was discussed. They also knew that Johnson had placed a telephone call in an attempt to find someone to forge the check. They had already obtained sufficient information to obtain a warrant for the arrest of Dodd. They had information that Johnson was tied in with Dodd, by the fact that Dodd had given Johnson's telephone number as the place where he could be reached, and by the fact that the Los Angeles police files recorded Johnson as having been implicated in some of Dodd's previous criminal history. Johnson had also been identified from a photo spread.

Although the district judge indicated at certain portions of the record that he did not believe that probable cause existed for the arrest at the time of the initial entry into the Johnson residence, this was not squarely addressed or analyzed by the judge, for the reason that he found that the arrest did not occur until the agents specifically told Johnson that he was under arrest. It was conceded by the attorney for the appellant at oral argument that this is a matter which, under these circumstances, should be reviewed *de novo* by the appellate court.

The facts and circumstances within the knowledge of the agents, of which they had reasonably trustworthy information, were sufficient to warrant a prudent person's belief that the petitioner had committed a criminal offense, under the standards of *Beck* v. *Ohio*, 379 U.S. 89, 85 S.Ct. 223,

13 L.Ed.2d 142 (1964). Information which comes from a known perpetrator of a federal crime, such as Kearney and Powell, concerning another who is involved with the perpetrator, is generally entitled to a greater weight than mere hearsay information concerning an alleged offense. *Wooten* v. *United States*, 380 F.2d 230, 232 (5th Cir. 1967). Probable cause existing, the arrest of the appellant at the doorway of his residence did not violate his constitutional rights.

Having determined the legality of the arrest and that the defendant was advised of his constitutional rights pursuant to *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), we must next consider appellant's argument that the confessions were not voluntary. Appellant contends that the oral and written statements were the result of psychological pressure and confusion generated by the custodial setting, coupled with Johnson's desire to cooperate with the agents so that he would be released on bail.

In addition to meeting the requirements set forth in *Miranda*, statements made by a defendant, in order to be admissible, must also be the product of a free and rational choice, as evidenced by the "totality of the circumstances" surrounding the statement. *Greenwald* v. *Wisconsin*, 390 U.S. 519, 521, 88 S.Ct. 1152, 20 L.Ed.2d 77 (1968); *Davis* v. *North Carolina*, 384 U.S. 737, 740, 86 S.Ct. 1761, 16 L.Ed.2d 895 (1966). The test for the voluntariness of a confession was set out by the United States Supreme Court in *Bram* v. *United States*, 168 U.S. 532, 542–43, 18 S.Ct. 183, 42 L.Ed. 568 (1897) and reiterated in *Hutto* v. *Ross*, 429 U.S. 28, 30, 97 S.Ct. 202, 203, 50 L.Ed.2d 194 (1976):

> The test is whether the confession was "extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence".

There is little in the record to support appellant's contention that the confessions were not voluntary. Viewing the evidence as a whole in the light most favorable to the Government, as required by *Glasser* v. *United States*, 315 U.S.

60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942), we agree with the findings of the trial court that the confessions were voluntarily given.

JURY INSTRUCTIONS

The trial court instructed the jury as to its consideration of the confession as follows:

> If it appears from the evidence in the case that a defendant has made a confession or admission you are instructed that you shall give such confession or admission such weight as you feel it warrants under all the circumstances shown by the evidence in the case as to whether it was voluntarily made or involuntarily made. Only if you find that the confession or admission was voluntarily made can you consider it as evidence respecting guilt or innocence of the defendant who has made such confession or admission.

Appellant's requested instruction which the trial court declined to give stated:

> If it appears from the evidence in the case that a confession (admission) would not have been made, but for some threat of harm or some offer or promise of immunity from prosecution, or leniency in punishment, or other reward, such a confession should not be considered as having been voluntarily made, because of the danger that a person accused might be persuaded by the pressure of hope or fear to confess as facts things which are not true, in an effort to avoid threatened harm or punishment, or to secure a promised reward.
>
> If the evidence in the case leaves the jury with a reasonable doubt as to whether a confession was voluntarily made, then the jury should disregard it entirely.
>
> If, on the other hand, you find that the confession (admission) in evidence was voluntarily made, then you will give it such weight as you feel it deserves under the circumstances.
>
> The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Appellant contends that the instruction given has two fatal shortcomings which the requested instruction would have overcome. The first is that the given instruction fails to define the term "voluntary". The duty to instruct the jury extends to the accurate definition of words and phrases having technical meanings. However, it is unnecessary to define words which are in common use and are readily comprehended by persons of ordinary intelligence. *United States* v. *Maude*, 150 U.S.App.D.C. 378, 391, 481 F.2d 1062, 1075 (1973). The word "voluntary" is such a term, understood in common usage, which accords with the test expressed in *Bram* v. *United States*, supra. There was no error in not defining the term.

The second alleged shortcoming of the instruction given is that the jury was not instructed to apply the "reasonable doubt" standard to its determination of the voluntariness of the confession. This matter was recently addressed by our court in *United States* v. *Curtiss*, 568 F.2d 643 (9th Cir. 1978). We there stated that the enactment of 18 U.S.C. § 3501(a) resolved a previous conflict and requires federal courts to follow the so-called "orthodox" procedure, whereby the trial judge is to determine the voluntariness of a confession outside the presence of the jury; and if the trial judge determines that the statement is voluntary, it is admissible. The jury may then hear the voluntariness evidence and give such weight to the statement as it feels is deserved under all the circumstances. *United States* v. *Curtiss*, 568 F.2d at 647, n.4. The "Massachusetts procedure", which had been followed by some courts, and which required the inclusion of the reasonable doubt standard, is not the standard required by 18 U.S.C. § 3501(a). The jury was therefore adequately and properly instructed on this subject.

The judgment is affirmed.

APPENDIX D

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 77-3808.

UNITED STATES OF AMERICA,
APPELLEE,

v.

RAYMOND EUGENE JOHNSON,
APPELLANT.

Dec. 19, 1978.

Appeal from the United States District Court
for the Central District of California.

Before ANDERSON and HUG, *Circuit Judges*, and EAST*, *District Judge*.

HUG, *Circuit Judge:*

Appellant, Raymond Eugene Johnson, was convicted in a jury trial of aiding and abetting the obstruction of correspondence, a violation of 18 U.S.C. § 1702 and 18 U.S.C. § 2. Johnson appeals on the ground that statements made by him on the day of his arrest should have been suppressed for the reason that the arrest was illegal and the statements were products of the illegal arrest and not voluntarily made, and on the further ground that the judge committed error in instructing the jury concerning the voluntariness of appellant's confession. We affirm.

FACTS

On March 30, 1977, Lena Kearney received by mistake in the mail a letter addressed to Elihu Peterson, containing a

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*Honorable William G. East, United States District Judge for the District of Oregon, sitting by designation.

United States Treasury check payable to Peterson, in the amount of $4,681.00. Kearney discussed the receipt of this check with her sister-in-law, Wynona Powell, and decided to keep the check and attempt to cash it. Powell then phoned a friend, Joe Dodd, to ask him for assistance in cashing the check. On the following day, Dodd arrived at the Kearney residence with Eugene McCardell and Raymond Johnson, the appellant. The three men seated themselves around a coffee table in Kearney's living room and studied the check. Johnson picked up the check and made a telephone call. During this call he discussed the check and the difficulty of cashing the check because of the age of the payee. Johnson then returned after completing the call and stated that he believed he had someone who could assist them in cashing the check. Dodd, Johnson and McCardell then left the Kearney residence and took the check with them.

Special Agent Richard Hemenway of the United States Secret Service commenced investigating this matter. He interrogated Lena Kearney, who told him that appellant Johnson was one of three men who came to her house for the check and participated in a general discussion as to how to cash the check. She further stated that Johnson made a telephone call in an attempt to find someone to forge the check. Kearney also identified Johnson from a photo spread as the person who had come to her house. Wynona Powell gave Agent Hemenway appellant Johnson's telephone number, which she stated had been given to her by Dodd as the number at which Dodd could be contacted. Upon checking with the Los Angeles Police Department, Agent Hemenway discovered that Johnson was named in the criminal history files as an associate of Dodd in Dodd's criminal history. Special Agent Hemenway did obtain a warrant for the arrest of Dodd, based on the above and other information obtained through investigation. A warrant for the arrest of Johnson was not obtained.

Special Agent Hemenway and Special Agent William Pickering went to the Johnson house on May 5, 1977, at approximately 6:00 P.M. The agents watched the house for a short period and Agent Pickering saw Johnson's vehicle,

with two persons inside, pull up to the driveway of Johnson's house. The two agents then approached the doorway, drew their weapons, pointed them downward and knocked, at first identifying themselves by ficticious names. When Johnson opened the door, Hemenway introduced himself and Pickering as special agents and asked to talk with Johnson. Johnson told the agents to come in. Pickering then stood in the living room with Johnson, while Hemenway looked into the other rooms for other people who might be in the house and present a possible danger to the agents. A woman was discovered during the search and was asked to go into the living room. After Hemenway finished looking into the rooms, which took between 15–20 seconds, he told Pickering that everything was secure. Pickering and Hemenway then returned their weapons to their holsters.

Hemenway then asked Johnson if he would step into the bedroom to talk with him and Johnson agreed. Before entering the bedroom, Hemenway informed Johnson of his constitutional rights. Johnson responded and stated that he wished to cooperate and then told Hemenway of his involvement in taking the Treasury check. Johnson was then told that he was under arrest. The agents and Johnson left the residence and went to the police station. At the station, Johnson was again advised of his constitutional rights and stated that he understood them. He told Pickering of his involvement with the check, while Pickering wrote out the statement. Johnson read the statement made changes and initialed them. He was placed under oath by Pickering and signed the statement.

LEGALITY OF THE ARREST AND VOLUNTARINESS OF THE CONFESSION

It was the testimony of the two special agents that they had not intended to effect an arrest at the time they initially entered the residence of appellant Johnson. It was their belief that an arrest had not occurred until after the interview with Johnson. However, whether an arrest has occurred depends upon an objective, not subjective, evaluation of what a person innocent of a crime would have

thought of the situation, given all of the factors involved. Whether an arrest has occurred depends in each case upon an evaluation of all the surrounding circumstances. Primary among these is a determination of whether or not the defendant was free to choose between terminating or continuing the encounter with the law enforcement officers. *Sibron v. New York*, 392 U.S. 40, 67, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968); *United States v. Sanudo-Perez*, 564 F.2d 1288, 1290 (9th Cir. 1977).

From a review of all of the circumstances surrounding the encounter between Johnson and the special agents, we find that appellant's arrest occurred immediately upon the entry of the agents into Johnson's home. They entered the home with drawn guns, which remained drawn until the search of the home had been concluded. Johnson was held in the living room while the house was searched. One of the agents remained with Johnson at all times. It is extremely doubtful that Johnson would have believed that he was free to leave at any time or to request the officers to leave, and it seems that a reasonable person, under those circumstances, would have thought that he was under arrest.

We must therefore consider whether probable cause existed prior to the entry of the special agents into the Johnson residence. The special agents had received information from Lena Kearney and Wynona Powell that Johnson had been present with Dodd and McCardell at the Kearney residence when the check was viewed and the cashing of it through a forged signature was discussed. They also knew that Johnson had placed a telephone call in an attempt to find someone to forge the check. They had already obtained sufficient information to obtain a warrant for the arrest of Dodd; they had information that Johnson was tied in with Dodd, by the fact that Dodd had given Johnson's telephone number as the place where he could be reached, and further that the Los Angeles police files recorded Johnson as having been implicated in some of Dodd's previous criminal history. Johnson had also been identified from a photo spread.

It certainly would have been preferable had the agents obtained a warrant for the arrest of Johnson before ob-

taining entrance to the Johnson residence. However, if probable cause exists for the arrest, appellant's constitutional rights were not violated by the warrantless arrest, even though there may have been time to have obtained a warrant for his arrest. *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976).

Although the district judge indicated at certain portions of the record that he did not believe that probable cause existed for the arrest at the time of the initial entry into the Johnson residence, this was not squarely addressed or analyzed by the judge, for the reason that he found that the arrest did not occur until the agents specifically told Johnson that he was under arrest. It was conceded by the attorney for the appellant at oral argument that this is a matter which, under these circumstances, should be reviewed *de novo* by the appellate court.

The facts and circumstances within the knowledge of the agents, of which they had reasonably trustworthy information, were sufficient to warrant a prudent person in believing that the petitioner had committed a criminal offense, under the standards of *Beck v. Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964). Information which comes from a known perpetrator of a federal crime, such as Kearney and Powell, concerning another who is involved with the perpetrator, is generally entitled to greater weight than mere hearsay information concerning an alleged offense. *Wooten v. United States*, 380 F.2d 230, 232 (5th Cir. 1967). Probable cause existing, the arrest of the appellant upon entry into his residence did not violate his constitutional rights.

Having determined the legality of the arrest and that the defendant was advised of his constitutional rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), we must next consider appellant's argument that the confessions were not voluntary. Appellant contends that the oral and written statements were the result of psychological pressure and confusion generated by the custodial setting, coupled with Johnson's desire to cooperate with the agents so that he would be released on bail.

In addition to meeting the requirements set forth in *Miranda*, supra, statements made by a defendant, in order to be admissible, must also be the product of a free and rational choice, as evidenced by the "totality of the circumstances" surrounding the statements. *Greenwald v. Wisconsin*, 390 U.S. 519, 521, 88 S.Ct. 1152, 20 L.Ed.2d 77 (1968); *Davis v. North Carolina*, 384 U.S. 737, 740, 86 S.Ct. 1761, 16 L.Ed.2d 895 (1966). The test for the voluntariness of a confession was set out by the United States Supreme Court in *Bram v. United States*, 168 U.S. 532, 542–3, 18 S.Ct. 183, 42 L.Ed. 568 (1897) and reiterated in *Hutto v. Ross*, 429 U.S. 28, 30, 97 S.Ct. 202, 203, 50 L.Ed.2d 194 (1976):

> The test is whether the confession was 'extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence'.

There is little in the record to support appellant's contention. Viewing the evidence as a whole in the light most favorable to the government, as required by *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942), we agree with the findings of the trial court that the confessions were voluntarily given

JURY INSTRUCTIONS

The trial court instructed the jury as to its consideration of the confession as follows:

> If it appears from the evidence in the case that a defendant has made a confession or admission you are instructed that you shall give such confession or admission such weight as you feel it warrants under all the circumstances shown by the evidence in the case as to whether it was voluntarily made or involuntarily made. Only if you find that the confession or admission was voluntarily made can you consider it as evidence respecting guilt or innocence of the defendant who has made such confession or admission.

Appellant's requested instruction which the trial court declined to give stated:

> If it appears from the evidence in the case that a confession (admission) would not have been made, but for some threat of harm or some offer or promise of immunity from prosectuion, or leniency in punishment, or other reward, such a confession should not be considered as having been voluntarily made, because of the danger that a person accused might be persuaded by the pressure of hope or fear to confess as facts things which are not true, in an effort to avoid threatened harm or punishment, or to secure a promised reward.
>
> If the evidence in the case leaves the jury with a reasonable doubt as to whether a confession was voluntarily made, then the jury should disregard it entirely.
>
> If, on the other hand, you find that the confession (admission) in evidence was voluntarily made, then you will give it such weight as you feel it deserves under the circumstances.
>
> The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Appellant contends that the instruction given has two fatal shortcomings which the requested instruction would have overcome. The first is that the given instruction fails to define the term "voluntary". The duty to instruct the jury extends to the accurate definition of words and phrases having technical meanings. However, it is unnecessary to define words which are in common use and are readily comprehended by persons of ordinary intelligence. *United States v. Maude*, 156 U.S.App. D.C. 378, 391, 481 F.2d 1062, 1075 (1973). The word "voluntary" is such a term, understood in common usage, which accords with the test expressed in *Bram v. United States*, supra. There was no error in not defining the term.

[12] The second alleged shortcoming of the instruction given is that the jury was not instructed to apply the reasonable doubt standard to its determination of the voluntariness of the confession. This matter was recently addressed by our court in *United States v. Curtiss*, 568 F.2d 643 (9th Cir. 1978). We there stated that the enactment of 18

U.S.C. § 3501(a) resolved a previous conflict and requires federal courts to follow the so-called orthodox procedure whereby the trial judge is to determine the voluntariness of a confession outside the presence of the jury, and if the trial judge determines that the statement is voluntary, it is admissible. The jury may then hear the voluntariness evidence and give such weight to the statement as it feels it deserves under all the circumstances. *United States v. Curtiss*, supra at 647 n.4. The "Massachusetts procedure", which had been followed by some courts and which required the inclusion of the reasonable doubt standard, is not the standard required by 18 U.S.C. § 3501(a). The jury was therefore adequately and properly instructed on this subject.

The judgment is affirmed.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 77-3808

Filed Sept. 2, 1980

UNITED STATES OF AMERICA,
APPELLEE,

v.

RAYMOND EUGENE JOHNSON,
APPELLANT.

Appeal from the United States District Court
for the Central District of California

Before: ANDERSON and HUG, *Circuit Judges, and* EAST*, *District Judge.*

In light of Payton v. New York, 48 U.S.L.W. 4375 (April 15, 1980) we grant appellants' petition for rehearing.

Our prior opinion in this case is withdrawn and a copy of the Opinion, reversing the judgment, is hereto attached.

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* Honorable William G. East, United States District Judge for the District of Oregon, sitting by designation.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 77-3808

Filed Dec. 29, 1980

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

RAYMOND EUGENE JOHNSON,
DEFENDANT-APPELLANT.

ORDER

Before: ANDERSON and HUG, *Circuit Judges*, and EAST*, *District Judge*

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Anderson and Hug have voted to reject the suggestion for a rehearing en banc and Judge East recommends rejection of the suggestion.

The Amended Opinion heretofore filed in this case has been revised in accordance with the Order filed herewith.

The full court has been advised of the en banc suggestion and revisions to the Amended Opinion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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*The Honorable William G. East, United States District Judge for the District of Oregon, sitting by designation.